

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

WILFREDO SILVA-REYES,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

CIVIL 05-2300 (JAG)  
(CRIMINAL 04-0015 (JAG))

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on motion by petitioner Wilfredo Silva-Reyes ("Silva-Reyes") to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (Civil 05-2300, Docket No. 2.)

On January 16, 2004, a grand jury in the District of Puerto Rico returned a two-count indictment against Silva-Reyes. (Criminal No. 04-0015, Docket No. 2.) Count One charged Silva-Reyes with "knowingly and intentionally attempt[ing] . . . to possess with intent to distribute 100 grams or more of heroin . . . in violation of Title 21, [U.S.C.] Section 841(a)(1); all in violation of Title 21, [U.S.C.] Section 846." Count Two charged Silva-Reyes with carrying, using and possessing a firearm, during and in relation to a drug trafficking, in violation of Title 21, U.S.C. § 846; all in violation of Title 18, U.S.C. § 924(c). (Criminal 04-0015, Docket No. 2.)

1 CIVIL 05-2300 (JAG) 2  
2 (CRIMINAL 04-0015 (JAG))

3  
4 On August 12, 2004, Silva-Reyes entered into a plea agreement, pleading  
5 guilty to the two-count indictment in exchange for a recommended sentence of  
6 eighteen (18) months as to Count One and (60) months as to Count Two, to run  
7 consecutively for a total of seventy-eight (78) months. (Criminal 04-0015, Docket  
8 No. 28, at 4.) On December 3, 2004, Silva-Reyes was sentenced to a term of  
9 imprisonment seventy-eight (78) months. (Criminal 04-0015, Docket No. 52,  
10 Sentencing Tr. at 7:16-21.)  
11

12 In his motion, Silva-Reyes alleges trial counsel provided ineffective  
13 assistance because he (1) allegedly incorrectly advised him that pursuant to his  
14 plea agreement he would serve a total imprisonment term of eighteen (18)  
15 months for the controlled substance, no imprisonment for being in possession of  
16 a firearm, could spend Christmas with his family and self surrender, thus resulting  
17 in the guilty plea being illegally obtained; (2) failed to file a notice of appeal; (3)  
18 misrepresented to Silva-Reyes that he would have an opportunity to enroll in a  
19 Bureau Of Prisons substance abuse program, which would have resulted in a  
20 deduction from Silva-Reyes' sentence; (4) failed to explain to Silva-Reyes any  
21 strategies and defenses in his case.<sup>1</sup> (Civil 05-2300, Docket No. 2, at 10-12.)  
22  
23  
24  
25

---

26 <sup>1</sup> As the government points out, Silva-Reyes' claims are intermingled in his  
27 section 2255 motion. (See Civil 05-2300, Docket No. 23, at 1, n.1; Docket No.  
28 2, at 10-11.) They have been separated and reorganized here for the sake of  
clarity.

1 CIVIL 05-2300 (JAG) 3  
2 (CRIMINAL 04-0015 (JAG))

3  
4 The government filed a response to Silva-Reyes motion on May 6, 2008.  
5 (Civil 05-2300, Docket No. 23.) The case was referred to me for a report and  
6 recommendation on October 31, 2007. (Civil 05-2300, Docket No. 22.)

7 Having considered the arguments of the parties and for the reasons set  
8 forth below, it is my recommendation that Silva-Reyes' motion to vacate, set  
9 aside, or correct sentence should be DENIED.  
10

#### 11 I. FACTUAL AND PROCEDURAL BACKGROUND

12 On August 12, 2004, the plea agreement (Criminal 04-0015, Docket No. 28)  
13 was filed and a change of plea hearing was held under Rule 11(c)(1)(B) of the  
14 Federal Rules of Criminal Procedure. (Criminal 04-0015, Docket No. 29.) During  
15 the plea colloquy, Silva-Reyes responded to questions of the court, giving his  
16 complete name, age, how far he went in school, if he was under the influence of  
17 any drug or alcoholic beverage and if he understood what was happening at the  
18 hearing. (Criminal 04-0015, Docket No. 51, Change of Plea Hearing Tr. at 4.)  
19 After answering all the questions of the court and indicating he understood  
20 everything that was happening, Silva-Reyes agreed to plead guilty to Counts One  
21 and Two of the indictment. (Id. at 20.) The plea agreement provided a  
22 recommendation that Silva-Reyes would be sentenced as being held accountable  
23 for a drug quantity of at least ten (10) but not more than twenty (20) grams of  
24 heroin, resulting in a base offense level of sixteen (16) under U.S.S.G. §  
25  
26  
27  
28

1 CIVIL 05-2300 (JAG) 4  
2 (CRIMINAL 04-0015 (JAG))

3 2D1.1(c)(12), a two-level enhancement for abuse of a position of trust (Silva-  
4 Reyes was a police officer) under U.S.S.G. § 3B1.3, and a three-level reduction  
5 for acceptance of responsibility applied under U.S.S.G. § 3E1.1(b). (Criminal 04-  
6 0015, Docket No. 28, at 4.) The plea specified there would be no further  
7 adjustments or departures to the base offense level. (Id.) By pleading guilty  
8 under Rule 11(c)(1)(B), Silva-Reyes also waived any right of appeal. (Criminal  
9 04-0015, Docket No. 51, Change of Plea Hearing Tr. at 10:6-7.)

12 During the change of plea hearing, the district court questioned Silva-Reyes  
13 as to the plea-bargained sentence, and petitioner's waiver of his right to appeal.  
14 The record reflects that Silva-Reyes was fully aware he agreed to a term of  
15 imprisonment of seventy eight (78) months; eighteen (18) months as to Count  
16 One and a consecutive term of sixty (60) months as to Count Two. Silva-Reyes  
17 pleaded guilty to both the narcotics offense and the firearm charge and  
18 acknowledged he was knowingly and voluntarily waiving his right to appeal the  
19 judgment and the sentence. (Criminal 04-0015, Docket No. 51, at 8-14.)

22 On December 3, 2004, Silva-Reyes was sentenced to a total imprisonment  
23 term of seventy-eight (78) months as stipulated in his plea agreement. (Criminal  
24 04-0015, Docket No. 52, at 7.)

26 On January 25, 2005 Silva-Reyes filed a pro se notice of appeal to the  
27 United States Court of Appeals of the First Circuit, alleging that: "1. Defendant  
28

1 CIVIL 05-2300 (JAG) 5  
2 (CRIMINAL 04-0015 (JAG))

3  
4 previously asked his counsel, Mr. Antonio Bauzá, to appeal the sentence on  
5 December 3, 2004[;] 2 Defendant have been attempting to contact his attorney  
6 regarding the sentence appeal but all the attempts had failed.” (Criminal 04-  
7 0015, Docket No. 37.)

8 On November 17, 2005, Silva-Reyes’ appeal was dismissed by the court for  
9 lack of jurisdiction because Silva-Reyes “failed to show that any timely notice of  
10 appeal was filed.” United States v. Silva-Reyes, Appeal No. 05-1257 (1st Cir.  
11 November 17, 2005).

12  
13 On December 14, 2005 Silva-Reyes filed this motion to vacate pursuant to  
14 28 U.S.C. § 2255. (Criminal 05-2300, Docket No. 2.)

## 15 II. DISCUSSION

16  
17 “In all criminal prosecutions, the accused shall enjoy the right to . . . the  
18 Assistance of Counsel for his defence.” U.S. Const. amend. 6. To succeed on an  
19 ineffective assistance of counsel claim, the petitioner, Silva-Reyes, has the  
20 responsibility of showing “that there is a reasonable probability that, but for  
21 counsel’s unprofessional errors, the result of the proceeding would have been  
22 different. A reasonable probability is a probability sufficient to undermine  
23 confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 694 (1984).  
24 Petitioner must satisfy both prongs of the Strickland test in order to prevail on his  
25 claim of ineffective assistance of counsel. Smith v. Robbins, 528 U.S. 259, 289  
26  
27  
28

1 CIVIL 05-2300 (JAG) 6  
2 (CRIMINAL 04-0015 (JAG))

3 (2000). The petitioner "must show that 'counsel's representation fell below an  
4 objective standard or reasonableness' and that 'the deficient performance  
5 prejudiced his defense.'" Owens v. United States, 483 F.3d 48, 63 (1<sup>st</sup> Cir. 2007)  
6 (quoting Strickland v. Washington, 466 U.S. at 687-88). Because Silva-Reyes has  
7 not shown that there were any errors in his representation, let alone any prejudice  
8 resulting from the errors, his claim of ineffective assistance of counsel fails.  
9

10  
11 A. Involuntary and Unintelligent Change of Plea

12 Silva-Reyes alleges that counsel induced him to plead guilty to a term of  
13 imprisonment of eighteen (18) months on the promise that he would not receive  
14 any term of imprisonment for being in possession of the firearm, would be able  
15 to visit his family over Christmas and then self surrender.  
16

17 In considering such a claim, the most important factor is whether the plea  
18 was knowing and voluntary within the meaning of Federal Rule of Criminal  
19 Procedure 11. United States v. Isom, 85 F.3d 831, 834 (1<sup>st</sup> Cir. 1996) (citing  
20 Federal Rule of Criminal Procedure 11); see United States v. Gray, 63 F.3d 57, 60  
21 (1<sup>st</sup> Cir. 1995); United States v. Cotal-Crespo, 47 F.3d 1, 3-4 (1<sup>st</sup> Cir. 1995);  
22 United States v. Parrilla Tirado, 22 F.3d 368, 371 (1<sup>st</sup> Cir. 1994).  
23

24 A court must review the transcripts of a plea colloquy with three (3)  
25 concerns: (1) the absence of coercion; (2) that the defendant understood of the  
26 charges; and (3) the defendant understood the consequences of the guilty plea.  
27  
28

1 CIVIL 05-2300 (JAG) 7  
2 (CRIMINAL 04-0015 (JAG))

3 United States v. Isom, 85 F.3d at 835 (quoting United States v. Gray, 63 F.3d at  
4 60).  
5

6 The plea colloquy at the change of plea hearing establishes that these three  
7 concerns were met. The court not only asked Silva-Reyes if he understood his  
8 rights, the consequences of pleading guilty, and whether he was coerced into such  
9 a plea, but the court asked the defendant no fewer than three times if he was  
10 guilty of the crimes in the indictment. (Criminal 04-0015, Docket No. 51, at 12-  
11 13.) The petitioner answered all these questions in the affirmative. (Id.)  
12 Therefore Silva-Reyes plea was knowing and voluntary.  
13

14 Petitioner agreed to have his sentence determined under the Sentencing  
15 Guidelines; waived any right to have facts that determine his offense level under  
16 the Guidelines alleged in the indictment and found by a jury beyond reasonable  
17 doubt; agreed that the court may consider any reliable evidence, including  
18 hearsay; and agreed to waive all constitutional challenges to the validity of the  
19 Sentencing Guidelines. (Criminal 04-0015, Docket No. 28, at 3.)  
20  
21

22 Had there been an indicia that petitioner did not fully understand the  
23 consequences of his waiver, the court might pause for further consideration.  
24 However, aside from the more than sufficient plea colloquy, it is difficult not to  
25 note that the petitioner was a police officer at the time of arrest and cannot have  
26  
27  
28

1 CIVIL 05-2300 (JAG) 8  
2 (CRIMINAL 04-0015 (JAG))

3 attributed to him a naivete to which he is not entitled. Cf. United States v.  
4 Borrero Acevedo, 533 F.3d 11, 18 (1st Cir. 2008).  
5

6 I keep in mind that “[i]t is the policy of the law to hold litigants to their  
7 assurances[.]” at a plea colloquy, United States v. Marrero-Rivera, 124 F.3d 342,  
8 349 (1st Cir. 1997) (quoting United States v. Parrilla-Tirado, 22 F.3d at 373), and  
9 “a defendant should not be heard to controvert his Rule 11 statements in a  
10 subsequent § 2255 motion unless he offers a valid reason why he should be  
11 permitted to depart from the apparent truth of his earlier statement[s].” United  
12 States v. Butt, 731 F.2d 75, 80 (1<sup>st</sup> Cir. 1984).  
13

14 In order to believe the arguments of petitioner, the court would have to  
15 disbelieve his representations given at the change of plea hearing. See United  
16 States v. Borrero Acevedo, 533 F.3d at 17. The court clearly told petitioner that  
17 paragraph 18 of his plea agreement called for a waiver of an appeal if the court  
18 should follow the terms and conditions of the plea agreement, and that if the court  
19 should not follow the agreement, then he would have the right to appeal.  
20  
21 (Criminal 04-015, Docket No. 28, at 7.)  
22

23 But there is another reason to conclusively find that there is no merit in the  
24 motion. Petitioner received what he had bargained for. The record is void of any  
25 facts or circumstances which would lead a court to determine that the  
26  
27  
28



1 CIVIL 05-2300 (JAG) 9  
2 (CRIMINAL 04-0015 (JAG))

3 representation of counsel was so infirm that a Sixth Amendment violation ensued.  
4  
5 See, e.g., United States v. Cardona Díaz, 524 F.3d 20, 22-23 (1st Cir. 2008).

6 B. Notice of Appeal

7 Silva-Reyes argues that counsel failed to provide effective assistance, when  
8 he failed to file a timely notice of appeal. This claim fails because counsel was  
9 aware that the petitioner's plea had a specific sentencing recommendation  
10 attached to the waiver of appeal. As the government notes, "since petitioner  
11 made a knowing and voluntary waiver of appeal, and was sentenced pursuant to  
12 the plea agreement, filing an appeal would have been a breach of Silva-Reyes  
13 contractual obligations under the plea agreement." (Civil 05-2300, Docket No. 23,  
14 at 7.)  
15  
16

17 C. Bureau Of Prisons Substance Abuse Program

18 Silva-Reyes alleges counsel was ineffective in that he misrepresented to  
19 Silva-Reyes that once incarcerated, Silva Reyes would be eligible for a substance  
20 abuse program which would have deducted time from his sentence. There is  
21 nothing in the plea agreement indicating that Silva-Reyes would be eligible for  
22 such a program. As noted earlier, Silva-Reyes received what he bargained for.  
23  
24

25 D. Counsel's Failure to Explain Strategies and Defenses

26 Silva-Reyes alleges counsel failed to explain any strategies and defenses.  
27 However, Silva-Reyes presents no evidence to show or infer that trial counsel ever  
28

1 CIVIL 05-2300 (JAG) 10  
2 (CRIMINAL 04-0015 (JAG))

3 denied him such service. Cirilo-Muñoz v. United States, 404 F.3d 527, 530 (1st  
4 Cir. 2005) (noting petitioner bears burden of proof on both tiers of Strickland  
5 test).  
6

7 Even assuming trial counsel did not discuss strategies or defenses, Silva-  
8 Reyes has not shown how this prejudiced his defense. He still received the benefit  
9 of the plea agreement negotiated by trial counsel.  
10

### 11 III. CONCLUSION

12 In view of the above, I find that Silva-Reyes has not shown that trial counsel  
13 rendered ineffective assistance of counsel. Silva-Reyes has not shown that his  
14 guilty plea was unintelligent and involuntary, that he was entitled to an appeal,  
15 that he was entitled to join the substance abuse program through the Bureau of  
16 Prisons, that trial counsel did not discuss strategies or defenses, or that such lack  
17 of discussion prejudiced his defense. Therefore, it is my recommendation that  
18 petitioner Wilfredo Silva-Reyes' motion to vacate, set aside or correct his sentence  
19 under 28 U.S.C. § 2255 be DENIED.  
20  
21

22 Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any  
23 party who objects to this report and recommendation must file a written objection  
24 thereto with the Clerk of this Court within ten (10) days of the party's receipt of  
25 this report and recommendation. The written objections must specifically identify  
26 the portion of the recommendation, or report to with objections made and the  
27  
28

1 CIVIL 05-2300 (JAG) 11  
2 (CRIMINAL 04-0015 (JAG))

3 basis for such objections. Failure to comply with the rules precludes further  
4 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v.  
5 Maccorone, 973 F. 2d 22, 30-31 (1<sup>st</sup> Cir. 1992); Paterson Leitch Co. v. Mass. Mun.  
6 Wholesale Elec. Co., 840 F 2d 985 (1<sup>st</sup> Cir. 1988); Borden v. Sec'y of Health &  
7 Human Servs., 836 F.2d 4, 6 (1<sup>st</sup> Cir. 1987); Scott v. Schweiker, 702 F. 2d 13, 14  
8 (1<sup>st</sup> Cir. 1983); United States v. Vega, 678 F2d 376, 378-79 (1<sup>st</sup> Cir. 1982); Park  
9 Motor Mart, Inc. v. Ford Motor Co., 616 F2d 603 (1<sup>st</sup> Cir. 1980).

10  
11  
12 At San Juan, Puerto Rico, this 22d day of August, 2008.  
13  
14

15 S/ JUSTO ARENAS  
16 Chief United States Magistrate Judge  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28